Laborers International Union of North America, Local 271, AFL–CIO *and* New England Foundation Co., Inc. and United Brotherhood of Carpenters and Joiners of America, Local No. 94. Case 1–CD–1036

March 31, 2004

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge in this proceeding was filed October 15, 2003,[1] by New England Foundation Co. (the Employer), alleging that the Respondent, Laborers International Union of North America, Local 271, AFL–CIO (the Laborers or Laborers Local 271), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the United Brotherhood of Carpenters and Joiners of America, Local 94 (the Carpenters or Carpenters Local 94). The hearing was held December 17 before Hearing Officer A. Susan Lawson.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record,[2] the Board makes the following findings.

I. JURISDICTION

The Employer, a Massachusetts corporation, is a construction company with its principal office in Quincy, Massachusetts, which annually purchases, from entities outside the Commonwealth of Massachusetts, goods and services valued in excess of $50,000, and has an annual volume of business in excess of $1 million. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a subcontractor on the rehabilitation of the Washington Bridge in Providence, Rhode Island. The Employer's project consists of the placement of 14 drill shafts/caissons (7 in the river, and 7 on dry land adjacent to the river) to provide support for the bridge. To construct these caissons, first, a large vibratory hammer is used to drive a metal tube or casing into the ground until it hits hard rock (estimated as a depth of approximately 120–140 feet in this project). Next, a large drill is used to bore 7–20 feet further into the rock, and the ground-up rock is vacuumed upward and out of the casing. The hollow casing and the bore hole are then filled with concrete. By letter dated June 19, the Employer assigned the drilling and concrete-placement work to employees represented by the Laborers.[3] Nevertheless, Carpenters Local 94 claims that the employees it represents are entitled to the work.[4]

Over the course of several months after the Employer assigned the work on the project, the parties attempted, without success, to negotiate a settlement to the dispute. On September 19, the Carpenters filed a request for arbitration with the American Arbitration Association (AAA),[5] believing that the Laborers had orally agreed to such arbitration.[6] Nevertheless, the Laborers' representative, Edward DiRissio, has categorically denied that any such agreement was reached, and Laborers Local 271 has steadfastly insisted that it is not bound by the outcome of the arbitration proceeding. Laborers Local 271 has asked to participate in the arbitration hearing for the limited purpose of presenting evidence to protect its represented employees' asserted rights to the work in question, but has reiterated in writing the Union's unwillingness to be bound by the outcome.

On or about October 10, the Laborers' representative, Michael Sabitoni, telephoned the Employer's vice presi-

[1] All dates are in 2003, unless otherwise specified.

[2] We grant the Employer's and the Carpenters' separate, unopposed motions to correct the transcript.

We deny as moot the Employer's March 3, 2004 motion for an expedited decision in this matter, responded to by the Carpenters on or about March 5, 2004. Cases alleging violations of Sec. 8(b)(4)(D) are accorded statutory priority in Board processing pursuant to Sec. 10(l) of the Act, and we have so treated this case.

[3] Other work on the project, including that of driving the metal casings into the ground and building frameworks to steady the casings in the water, was assigned to employees represented by the Carpenters and is not in dispute.

[4] Prior to the hearing, it appeared that Carpenters Local 94 claimed the drilling work only with respect to the caissons in the water. At the hearing, however, it became clear that Carpenters Local 94 disputes the assignment of all the drilling work, both on land and in the water.

[5] The Carpenters' collective-bargaining agreement with the Employer provides for tripartite arbitration in the case of a work assignment dispute. The Laborers' contract provides only for bilateral arbitration.

[6] Carpenters Local 94 acknowledges that it became aware of the Laborers' unwillingness to proceed to arbitration in about mid-October.

dent, John Roma, and stated that, if the work assignments were changed, the Laborers would have no choice but to picket or strike the job. In addition, DiRissio testified that, upon hearing rumors that the disputed work would be reassigned to employees represented by the Carpenters, he tried repeatedly to reach Roma to discuss the issue. Eventually, on an unspecified date in October, DiRissio went to the worksite, where he informed Project Superintendent Shane O'Neill that Laborers Local 271 would picket the project if the employees it represented were laid off because the disputed work was reassigned to employees represented by the Carpenters. On October 15, the Employer filed the Board charge at issue. As of the time of the hearing, the disputed work was being performed in accordance with the Employer's original assignment.

B. Work in Dispute

The disputed work involves work associated with the drilling and placement of concrete for drill shafts/caissons on the Providence River Washington Bridge rehabilitation project in Providence, Rhode Island.

C. Contentions of the Parties

Carpenters Local 94 contends that the Laborers' threats of strikes and picketing were a sham and that the Employer colluded with the Laborers in encouraging them to make such threats, in order to obtain a Board determination that the work belongs to employees represented by the Laborers. Carpenters Local 94 further contends that the parties have agreed upon tripartite arbitration as a voluntary method for resolving this dispute. Thus, Carpenters Local 94 argues that the 10(k) proceeding must be dismissed. Carpenters Local 94 makes no argument as to the merits of the dispute.

The Employer contends that reasonable cause exists to believe that the Laborers' threats were serious and genuine, and that, based on Board precedent, the evidence is insufficient to demonstrate otherwise. The Employer further asserts that the parties have not agreed on a method for voluntary resolution of the dispute: Laborers Local 271 clearly denies that it has agreed to be bound by the Carpenters' arbitration, the Employer has no recollection of the Laborers agreeing during settlement discussions to be bound by such arbitration, and there is no other basis for applying the terms of the Carpenters' arbitration provision to the Laborers. As to the merits of the dispute, the Employer argues that the disputed work should be awarded to the employees represented by the Laborers, based on the collective-bargaining agreements, its own preference and past practice, industry practice, relative skills and safety, and economy and efficiency of operations.

Laborers Local 271 acknowledges that its agents threatened proscribed job actions if the work assignments on the project were changed. It asserts that these statements were not sham threats for the purpose of invoking the Board's 10(k) jurisdiction, but were genuinely motivated by its concern that the employees it represents would suffer layoffs as a result of the arbitration. Laborers Local 271 further contends that it has not agreed to voluntary arbitration that would be binding on it, that it is not signatory to the Carpenters' contract providing for tripartite arbitration, and that it has stated unequivocally that it is unwilling to be bound by the AAA proceeding. On the merits, Laborers Local 271 argues that the work in dispute should be awarded to the employees it represents on the basis of the collective-bargaining agreements, the Employer's preference and past practice, area practice, relative skills and safety, and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[7]

Initially, we find that there are competing claims for the work associated with drilling and placement of concrete for caissons on this project. Laborers Local 271 has at all times claimed this work for the employees it represents, and these employees have been performing the work. The scope of the Carpenters' claim to the work has broadened since the dispute first arose, but it was clear at the hearing that it claims the work, both in the water and on land, for the employees it represents.

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by the Laborers' threats of proscribed job actions. The Carpenters' argument that these threats were a sham and the product of collusion with the Employer relies on evidence that the Carpenters' own attorney accused the Employer and the Laborers of such collusion during settlement discussions. Contrary to the Carpenters' characterization, the evidence does not demonstrate that any individual admitted to collusion.[8] In the absence of affirmative evidence

[7] *Carpenters Local 275 (Lymo Constuction Co.)*, 334 NLRB 422, 423 (2001); *Teamsters Local 259 (Globe Newspapers Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

[8] Carpenters Local 94 also relies on a statement by the Laborers' attorney at a December 15 settlement discussion that he was "going to go with the 10(k) Hearing to try and get this done [his] way." That state-

that a threat to take proscribed action was a sham or was the product of collusion, the Board will find reasonable cause to believe that the statute has been violated. *Laborers (E & B Paving)*, 340 NLRB No. 150, slip op. at 3, fn. 4 (2003) (citing *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450–451 (1998)).

Finally, we conclude that the parties have not agreed on a method for the voluntary adjustment of the dispute. The tripartite arbitration provision contained in the Carpenters' collective-bargaining agreement with the Employer does not bind the Laborers, and the Laborers' own agreement does not provide for tripartite arbitration. The record does contain evidence that the Unions discussed the possibility of arbitration during settlement negotiations. Nevertheless, Laborers Local 271 denies that it agreed to be bound by such arbitration, and the Employer's testimony lends support to that denial. Moreover, it is undisputed that Laborers Local 271 has, more recently, stated repeatedly and unambiguously its refusal to be bound by the arbitrator's decision.[9] Under these circumstances, we find that there is no voluntary agreement that would bind all the parties.

Accordingly, we conclude that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither Union has been certified to represent the employees who are performing the disputed work, but the Employer has entered into collective-bargaining agreements with both Unions. The Laborers' agreement expressly applies to "[c]onstruction of shafts [and] caissons" and covers, inter alia, "[d]rilling and blasting, mucking and removal of material from the tunnels and shafts" and "[p]ouring . . . of concrete in any tunnel or shaft." The agreement also applies to "footings and foundations for bridges" and "dumping of concrete for trem[i]e work over water on caissons" and establishes wage rates applicable to caisson construction, including both drilling and concrete-placement work. In contrast, the Carpenters' agreement refers without any further detail to jurisdiction over "caisson and cofferdam construction" and contains no reference to drilling, placement of concrete, or applicable wages for such work. Because the Laborers' agreement expressly and specifically covers the work in dispute, while the Carpenters' agreement refers in a much more limited and general way to caisson work, we find the factor of collective-bargaining agreements tends to favor awarding the work in dispute to the employees represented by the Laborers.[10]

2. Employer preference and past practice

The Employer prefers to assign the disputed work, and has assigned drilling work and placement of concrete involving caissons, both on this project and in the past, to its employees represented by the Laborers. The Employer has not, in the past, assigned such work to its employees represented by the Carpenters. This factor supports awarding the work in dispute to the employees represented by the Laborers.

3. Area and industry practice

The Employer routinely assigns drilling work and placement of concrete in caisson construction in New England to the employees represented by the Laborers, as do other New England companies.[11] The Employer's assignment of the work on this project was based on its analogous assignment of work on recent and ongoing projects near the site of this project. The Employer's vice president, Roma, acknowledged that different practices are followed in New York and sometimes in Connecticut.[12] We find that the factor of area practice supports the Employer's current assignment of the work in

ment was made 2 full months after the charge had been filed regarding the Laborers' threats. Thus, it indicates nothing about the Laborers' motive in making the threats, only its intent to continue the process that began when the Employer filed the charge at issue.

[9] The Employer has moved to reopen the record for the purpose of admitting into evidence a letter from the arbitrator, dated February 3, 2004, allowing representatives of the Laborers to testify in the arbitration hearing if called as witnesses and accepting Laborers Local 271's position that it will not be not bound by the arbitrator's decision. In view of our disposition, we do not pass on the Employer's motion.

[10] Chairman Battista would not rely on the factor of collective-bargaining agreements. In his view, the language in the Carpenters' agreement is sufficient to cover the work in dispute. Accordingly, he finds that this factor does not clearly favor an award to either group of employees.

[11] In 1999, the business agent for a Carpenters union in Connecticut questioned the Employer's assignment of caisson-related work to employees represented by the Laborers, but after Roma explained the Respondent's practice with such assignments, the business agent did not pursue the matter.

[12] Roma also testified regarding one project in Boston on which the Carpenters and the Laborers negotiated an agreement to use a composite crew.

dispute to employees represented by the Laborers. The limited evidence presented regarding industry practice, however, does not clearly favor an award to either group of employees.

4. Relative skills, training, and safety

The record indicates that employees represented by the Laborers have consistently performed caisson-related drilling and concrete-placement work, and that, as a result, these employees have significant skills and training in this work. Because the drilling work is potentially quite dangerous, according to the Employer, greater experience translates into greater ability to perform this work safely. Roma testified that he does not know whether the employees represented by the Carpenters have the requisite skills and experience to perform the work safely. While it appears that neither group of employees has a great deal of experience performing the water-based drilling or concrete placement, the record establishes that such work involves the same skills as the land-based drilling and concrete placement, in which the employees represented by the Laborers are more experienced. Thus, this factor favors awarding the disputed work to the employees represented by the Laborers.

5. Economy and efficiency of operations

Roma testified that it would be more efficient for the employees represented by the Laborers to perform all of the drilling work because employees could be moved from water-based work to land-based work and vice versa. This testimony, however, appears irrelevant in light of the Carpenters' present claim to both land and water work, as the employees represented by the Carpenters could similarly be moved between land and water work.

Roma further testified that the employees represented by the Laborers have experience in drilling and concrete-placement work that would allow them to perform the disputed work more efficiently than the less-experienced employees represented by the Carpenters. Because this evidence relates to the employees' relative skills, training, and safety, which we have already considered, we find that this factor does not weigh in favor of either group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers International Union of North America, Local 271, AFL–CIO, are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area practice, and relative skills, training, and safety.

In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of New England Foundation Co., Inc., represented by Laborers International Union of North America, Local 271, AFL–CIO, are entitled to perform work associated with the drilling and placement of concrete for drill shafts/caissons on the Providence River Washington Bridge rehabilitation project in Providence, Rhode Island.

Dated, Washington, D.C. March 31, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD